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Supreme Court, U.S.
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No. 94-99

In The

Supreme Court of the United States

October Term, 1994

KINGO KAWAOKA and TATSUMI KAWAOKA,

Petitioners,

vs.

THE CITY OF ARROYO GRANDE; THE CITY COUNCIL OF ARROYO GRANDE; MARK M. MILLIS; B'ANN SMITH; GENE MOOTS; A.K. DOUGALL; and DORIS OLSEN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioner Tatsumi Kawaoka respectfully submits the following brief in reply to arguments first raised in the opposition that (1) this Court lacks subject matter jurisdiction over her "takings" claim under the Fifth and Fourteenth Amendments, and (2) that the lower courts engaged in "factual misstatements and distortions" of the facts in the record.

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PETITIONER'S CLAIMS THAT HER LAND WAS SUBJECTED TO A "TAKING" REQUIRING "JUST COMPENSATION".

1. Whether petitioner has waived her "takings" claim.

The Ninth Circuit recognizes no difference between substantive due process and "takings" challenges to land use regulation. The election of plaintiff's prior counsel not separately to allege a "taking" in the complaint is not only excusable, but an accurate reflection of the then-existing and current state of Ninth Circuit authority.

As recently as June 6, 1994, it was observed that "the Ninth Circuit has suggested that the due process standard of reasonable relation to legitimate purpose applies to the regulatory takings field as well," *The Adamson Companies v. City of Malibu*, ___ F.Supp. ___, 94 Daily Journal D.A.R. 9158 (C.D. CA June 6, 1994), citing *Commercial Builders v. Sacramento*, 941 F.2d 874 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1997 (1992). In *Commercial Builders* the Ninth Circuit held that this Court's

"substantially advance" test for regulatory takings articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) was identical to the "rational relationship" test in substantive due process analysis, with the burden placed on the landowner to prove "that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" (Petition, app. 41) without regard to whether "the City's legislative acts actually advance its stated purposes" (Petition, app. 15) (It is noteworthy that Judge Beezer's dissenting opinion in *Commercial Builders*, a case involving exactions upon commercial landowners for low income housing, advocated a test nearly identical to that articulated by this Court in *Dolan v. City of Tigard*, ___ U.S. ___ (1994) in which the city would have the burden of establishing the proportionality between the exaction and a causal nexus between the landowners' particular use of property, and the social problem sought to be ameliorated, i.e., the lack of low income housing).

The absence of a specific "takings" allegation in the complaint is consistent with the difficulty experienced by all courts in defining any line of demarcation between exercises of the police power (substantive due process) and eminent domain (takings). More than a century ago, Massachusetts Supreme Court Justice Oliver Wendell Holmes found the difference between exercises of the police power and eminent domain to be a matter of *degree, Rideout v. Knox*, 148 Mass. 368 (Mass. 1889), a view he would later express as a Justice of this Court in the oft-quoted passage in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) that "while property may be regulated to a

certain extent, if regulation goes too far it will be recognized as a taking", *Id* at 415. "The difficulty of determining, in cases involving nothing like a physical invasion or trespass, just how far is 'too far' has predictably plagued the Court for over six decades," Tribe, *American Constitutional Law 2d ed.* (1988), 595. See also, *Loveladies Harbor Inc. v. United States*, ___ F.3d ___, no. 91-5050 (Fed. Cir. June 15, 1994).

Petitioner Mrs. Kawaoka cannot be said to have waived her "takings" claim by failing to describe an analytical distinction between "takings" and "substantive due process" challenges which courts and scholars have heretofore been unable to define. She did not waive her "takings" claim by making her complaint conform to Ninth Circuit authority that there is no difference at all between "regulatory taking" and "substantive due process" analysis of land use regulation.

2. Whether petitioner was required to bring her "takings" claim in the state courts in the first instance.

Respondent badly misreads *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985), which did not hold, as respondent hoped, that landowners must litigate their "takings" claims in the state courts prior to invoking the jurisdiction of the federal courts. *Williamson* held that when an administrative procedure exists by which "just compensation" can be obtained by the landowner, irrespective of whether the proposed government action can be labeled a "taking", there must be a final administrative decision prior to any

court challenge. In *Williamson*, Tennessee law, in cases where government exercised its power of eminent domain, landowners had specific administrative and state court remedies to obtain compensation independent of challenges based upon the Constitution.

Nothing like the Tennessee statute applies to the present case. Respondent has not pointed to any administrative procedure available under state law, or any independent state law causes of action, in which the landowner may obtain just compensation for city actions not conceded to be an exercise of eminent domain. More importantly, there are no state administrative proceedings which apply anything resembling this Court's test of proportionality articulated in *Dolan*.

"Clearly, the Supreme Court contemplates that a facial takings challenge can be adjudicated prior to the exhaustion of all state remedies provided that a concrete controversy exists between the parties", *The Adamson Companies, supra*. The present "takings" challenge is a "facial" challenge because (1) the land could not be developed because the water moratorium was imposed, and (2) the city's requirement of a specific plan for approval of residential uses of the property while, at the same time, refusing to consider any specific plans, was the functional and logical equivalent of *enforcement* of an ordinance prohibiting all development without exception. A justiciable controversy is therefore presented to this Court.

II. THE LOWER COURTS HAVE NOT MISREPRESENTED THE FACTS IN THE RECORD.

In an odd but understandable example of "role reversal", it is the respondent city which attacks the lower courts' description of the facts as "[illegible]ortions" and "misstated, unsupported by the record or subject to substantial dispute" (Opposition, pg. 8), understandable because the facts cannot support the city's legal position.

Thus, respondents attack the lower courts' findings that agriculture was no longer an economically viable use of the Kawaoka property as not based on "substantive [*sic*] evidence on this point" and the courts therefore "*simply assumed* that continued agricultural use was not feasible" (Opposition, pg. 9). Respondent forgets that its published ordinance, Land Use Element 1.5, permitted conversion of the Kawaokas' (and Tomas' and Matsumotos') property to commercial or residential use only upon a finding that existing agricultural use was "no longer economically viable"; that its official but unwritten designation of the Kawaokas' property as residential was based upon evidence from the Kawaokas regarding the impossibility of realizing any reasonable return on investment through farming, Petition App. 66-67 (While the action has been pending, the petitioner has learned, not really to her surprise, that professional real estate appraisers and potential buyers are not willing to rely on the unpublished residential designation of the property. It is not reasonable to expect that any potential buyer would assume the risk of the city's inaction on approving a specific plan or enacting and publishing a residential

designation of the Kawaokas' property. All anecdotal evidence of land value necessarily assumed respondent's approval through City Council action of both a formal published regulation designating the Kawaokas' property as appropriate for residential use, and the approval of a specific plan; otherwise, the property's value is nil, with Mrs. Kawaoka facing insolvency).

Respondent city knows it is most vulnerable for its unexplained failure to entertain or consider any applications for "specific plans" after May 22, 1990, the date on which it simultaneously made approval of such "specific plans" a necessary prerequisite to converting the land use designation of the Kawaokas' property from agricultural to residential. The city is aware that this unexplained *default* in its decisionmaking process cannot reasonably be described as a delay in the decisionmaking process itself, losses from which a landowner would not ordinarily be entitled to compensation *Agins v. Tiburon*, 447 U.S. 255, 263 n.9 (1988). Respondent's personal attacks against petitioner and her representatives are a poor substitute for evidence to controvert the lower court's findings that the Kawaokas "were informed that they could not apply for specific plan until the ordinances containing the guidelines and applicable procedures were in place" (Petition, app. 7).

Finally, respondent attacks the lower courts for failing to find that "landowners essentially imposed their own moratorium by refusing to list or advertise the property and instructing their broker to reject any offers below the unrealistic value of $6,000,000" (Opposition, pg. 18). With respect, it was not the now-78 year old Mrs. Kawaoka who created the water moratorium, or who

decided that respondent would require approval of a specific plan for a residential designation while refusing to consider specific plan applications. An ordinance requiring a specific plan while the city refuses to consider specific plans gives the municipality total and absolute discretion over development, including the discretion to prevent any development at all. This dangerous gimmick, by which the municipality regulates land use without promulgating any written land use regulation subject to judicial review, is not yet "garden variety" land use planning anywhere in the United States, but will surely become so if the lower court is affirmed in this case.

CONCLUSION

The respondent concedes that the lower courts' analysis of this city's actions is inconsistent with *Dolan v. City of Tigard, supra,* arguing instead that *Dolan* should not apply to regulatory takings. The respondent concedes the conflict between the Ninth Circuit and state courts regarding substantive due process analysis. Current Ninth Circuit authority, which finds no analytical difference between substantive due process and takings challenges to land use regulation, is inconsistent with the authority of this Court and therefore inadequate to providing a rule of decision in the present case which will result in a resolution which is fair to both parties. Both Mrs. Kawaoka and the City of Arroyo Grande deserve an opportunity to participate with this Court in once again attempting to find a rule reconciling the legitimate interests of both the private landowner and the municipality.

The petition should be granted.

Date: August 24, 1994

Respectfully submitted,

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